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JOHN F. DAVIS

In The

Supreme Court of the United States

October Term, 1965

No. 1128

RENN DRUM, JR., On Behalf of Himself and all Others Similarly Situated,

and

JESSE H. AUSTIN, JR., NORMAN C. DENNING, JOSEPH GRIMES, MRS. RUTH SHAW, DAVID BRADLEY, MRS. JAMES PROTHRO, HUGH M. WILSON, ROBERT S. METZGER, and MRS. DAVID I. FORT,

Appellants,

v

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections,

Appellees.

On Appeal From the United States District Court For the Middle District of North Carolina

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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PRELIMINARY STATEMENT

The Appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by Appellants' appeal, file this statement in opposition to Appellants' Jurisdictional Statement and include their Motion to Affirm the judgment of the court below, upon the grounds that the question upon which the decision of this cause depends has been fully answered by this Court

and, therefore, the question is so unsubstantial as to obviate further argument.

PRIOR OPINIONS and PROCEEDINGS

The initial opinion in this case, rendered by the court below on November 30, 1965, is unrecorded. The court found the existing congressional apportionment unconstitutional and in its Interlocutory Order gave the State of North Carolina until January 31, 1966, to enact appropriate reapportionment statutes. On January 14, 1966, a congressional reapportionment plan was enacted and presented to the court below by the Appellees on a motion to dismiss. On February 18, 1966, the court below entered its order finding the congressional plan not in compliance with the Constitution, but allowed the primary and general election of 1966 to be held under the plan. The court required the State of North Carolina to enact a constitutional congressional plan by July 1, 1967.

On March 8, 1966, the court below denied Appellants' Motion for Rehearing.

Copies of the opinion and order of November 30, 1965, February 18, 1966, and order of March 8, 1966, are attached to the Appellants' Jurisdictional Statement as Appendices A-1, A-2 and A-3.

STATUTES INVOLVED

The provisions of § 163-103 of the General Statutes of North Carolina, enacted as Chapter 7, Extra Session 1966, on January 14, 1966, are involved in this proceeding.

QUESTION PRESENTED

Did the three-judge court below abuse its discretion by permitting the primary and general election of 1966 for United States Congressmen to proceed on an interim basis under the reapportionment plan which is found to be constitutionally defective?

STATEMENT OF THE CASE

On September 10, 1965, Appellant Drum filed his Complaint attacking the apportionment of the congressional districts and both Houses of the North Carolina General Assembly. On September 26, 1965, Defendants filed Answer and all parties agreed to expedite hearing of the case. On November 30, 1965, the three-judge court entered its opinion and Interlocutory Order declaring unconstitutional the existing apportionment of the congressional districts and both Houses of the General Assembly of North Carolina. On December 6, 1965, the Governor of North Carolina called an Extra Session of the General Assembly to meet on January 10, 1966, to consider only reapportionment of the congressional districts and both Houses of the General Assembly.

The General Assembly enacted reapportionment plans for both Houses of the General Assembly and congressional districts, and these plans were submitted to the court for hearing on February 4, 1966. On February 18, 1966, the court entered its opinion and order finding the reapportionment plans for both Houses of the General Assembly to be constitutional, but finding the congressional plan constitutionally defective.

The court below, recognizing the good faith effort of the Legislature to meet constitutional requirements and recognizing the obligation of the Federal courts to defer to the prerogative of the State Legislature in reapportionment matters and also recognizing the imminence of the 1966 primaries, exercised its equitable discretion and permitted the congressional elections for 1966 to take place under the plan passed by the Extra Session of the General Assembly.

The congressional reapportionment plan enacted by the General Assembly has a population variance ratio of 1.19 to 1, with a deviation of persons per congressman ranging from −8.91% in the smallest district to +8.39% in the largest district. The average deviation for all districts is 3.46%. The population difference between the largest and smallest district is 71,640.

A statistical analysis of the congressional plan, including map of the districts, is attached hereto as Appendices 1 and 2, respectively.

Appellants grounded their Petition for Rehearing, and this appeal upon the decision in SWANN v ADAMS, No. 973, decided February 25, 1966.

ARGUMENT

In considering the questions set forth in Appellants' Jurisdictional Statement, the Appellees contend that the substantive question involved is more accurately stated in a question propounded in abuse of discretion of the court below. Although the Appellees did not appeal from the decision of the court below finding the congressional plan constitutionally defective, the Appellees do not agree that the plan is constitutionally insufficient, but, on the other hand, contend that the congressional reapportionment plan meets the constitutional standards required under REYNOLDS v SIMS, 377 U.S. 533; 12 L. ed. 2d 506, 84 S. Ct. 1362 (and other companion cases).

The Appellees urge that the opinion and order of the court below of February 18, 1966, is in full compliance with the principles of remedial relief recognized in REYNOLDS v SIMS, *supra*. Appellees further urge that the case of SWANN v ADAMS, No. 973, decided February 25, 1966, is distinguishable and was not binding upon the court below, under the facts of this case, in the exercise of its equitable discretion.

Excerpts from Swann's brief filed in the United States Supreme Court, of which this Court may take judicial notice, reveal the history of that case as follows:

"Appellant Swann filed this action seeking reapportionment of both houses of the Florida Legislature in accordance with constitutional requirements. After final hearing the District Court on July 23, 1962, found

> " '. . . the existing provisions of the Constitution and statutes of the State of Florida which relate to the apportionment for the nomination and election of the members of the Senate and House of Representatives of the Legislature of Florida are invidiously discriminatory against the plaintiff.' SOBEL v ADAMS, 203 F. Supp. 316, 317.

"The Court found 'the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void, and prospectively inoperative.' SOBEL v ADAMS, 208 F. Supp. 316, 318. The Court, however, refusing to do the necessary reapportioning itself, turned the matter back to the state, noting:

> " 'Should the state fail or neglect to perform this obligation with that dispatch which the urgency of the matter requires, then the less desirable reapportionment by judicial decree would be required. It seems that there is ample time for a valid reapportionment to be made and become effective prior to the time for the convening of the regular legislative session in 1963.' SOBEL v ADAMS, 208 F. Supp. 316, 318.

"A special session of the Florida Legislature was then convened, which enacted a reapportionment amendment to the Florida Constitution for submission to the electorate at the general election in November, 1962.

"At this point, in its opinion dated September 5, 1962, the District Court back-tracked from its previous opinion and found:

> " '. . . that the rationality of a legislative apportionment may include a number of factors in addition to population . . . [That] Under the plan before us the House of Representatives would be apportioned by a formula in which population is heavily weighted. Because of this we think that population need not be a major factor in the apportionment of the other House.'

"The Court concluded that if the electorate should adopt the amendment proposed,

> "'. . . the State will have then adopted a rational plan of reapportionment, free from invidious discrimination.' SOBEL v ADAMS, 208 F. Supp. 316, 321, 323, 324.

"On November 6, 1962, the voters of Florida rejected the proposed constitutional amendment. At the same time they elected state legislators for the 1963 biennial legislative session on the basis of the legislative apportionment which had previously been declared prospectively null, void and inoperative by the District Court. The following day Appellant Swann again sought relief. On November 9, 1962, another special session of the Florida Legislature convened. It failed to take any action whatsoever. On December 10, 1962, Appellant Swann again sought judicial relief. Again a special session of the Florida Legislature was convened. This time the Legislature adopted a new plan, both as a temporary statutory reapportionment and as a permanent constitutional reapportionment to be submitted to the voters in November, 1964.

"Appellant Swann on February 4, 1963, again sought judicial relief, but to no avail, for on February 7, 1963, the District Court found the statutory and constitutional reapportionment valid and compatible with the requirements of the Federal Constitution. SOBEL v ADAMS, 214 F. Supp. 811. Appellant Swann appealed to the Supreme Court.

"On June 22, 1964, the Supreme Court reversed and remanded for further proceedings 'consistent with the views stated in the Courts' opinion in REYNOLDS v SIMS and other cases relating to state reapportionment decided along with Reynolds.'

"On July 20, 1964, Appellant Swann petitioned for relief consistent with REYNOLDS v SIMS. Among other things, Appellant Swann sought to enjoin the Secretary of State of the State of Florida from placing the proposed constitutional

amendment on the ballot in November, 1964. This constitutional amendment was identical to the statutory reapportionment found unconstitutional by this Court on June 22, 1964.

"On October 21, 1964, the District Court refused to enjoin the Secretary of State of Florida from placing this constitutional amendment on the ballot, thus requiring a popular vote on an amendment which would have been unconstitutional if adopted. Nevertheless, on November 3, 1964, the voters of Florida rejected the proposed constitutional amendment by a more than two-to-one margin.

"On November 12, 1964, Appellant Swann filed another petition, pointing out that since the proposed constitutional amendment had been defeated, there was now no basis, *de jure* or *de facto,* for a 1965 legislative session inasmuch as there was neither statute nor constitutional amendment providing for a valid apportionment plan under which the Legislature could function.

"The District Court ignored all requests for a hearing and on January 8, 1965, the District Court entered an order deferring all matters raised in the petitions of either Appellant until the conclusion of the next biennial session of the unconstitutionally apportioned Legislature, which convened on April 6, 1964. The order recited that the matters deferred would be *promptly* reconsidered if the Legislature of Florida had not validly reapportioned itself by July 1, 1965, in accordance with the standards laid down by this Court.

"A special reapportionment session of the Florida Legislature was convened in June, 1965. No results were reached and on June 22, 1965, the District Court entered an order requesting all parties to the cause and amici curiae to submit reapportionment plans to the Court by July 6, 1965, and gave the Legislature until July 1, 1965, to 'validly' reapportion itself.

"On June 29, 1965, the Florida Legislature enacted House

Bill No. 19-XX calling for a 58-member Senate and a 109-member House of Representatives.

"On July 6, 1965, the Appellants filed a joint petition asking the District Court to hold the newly enacted reapportionment plan unconstitutional. Nevertheless, no action whatsoever was taken by the District Court until October 5, 1965, when the Court ordered oral argument on all pending matters for November 2, 1965.

"On December 23, 1965, the Court entered the Order here appealed from. The opinion stated in part as follows:

> " 'The apportionment made by said statute, as herein modified, is approved as an interim plan for a period ending sixty days after the adjournment of the 1967 regular session of the Florida legislature; . . .' "

It is clear that the United States Supreme Court's opinion rendered on February 25, 1966, was a recognition of the failure of the Florida Legislature and the District Court to take positive action after four years of stalling litigation.

After the February 25 decision, the Governor of Florida called the Legislature into special session on March 2, 1966, for a 10-day period. Swann filed a petition with the Three-Judge Court a few days later asking that the Court reapportion. However, the Court declined to act on the Petition, but indicated it would effect reapportionment if the legislature failed to produce a constitutional plan during the special session.

The order of February 18, 1966, allowing the primaries and general election of 1966 to be held, granted the Plaintiff the exact relief requested in his Motion to Retain Jurisdiction. Plaintiff prayed therein that the Court decree the congressional plan invalid, but allow election to be held pursuant thereto in 1966 in order for the reapportioned State Legislature in 1967 to be given an opportunity to produce a more acceptable plan. The Supplemental Brief filed by the *Amicus Curiae* requested the same remedial relief.

The question of remedial relief was considered in REYNOLDS v SIMS, 377 US 533, 585-587:

> ". . . Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in BAKER v CARR, 'Any relief accorded can be fashioned in the light of well-known principles of equity.'
>
> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for

> legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

What was said in REYNOLDS was applied in WMCA, INC., v LOMENZO, 377 US 633; MARYLAND COMMITTEE v FAWES, 377 US 656; DAVIS v MANN, 377 US 678; ROMAN v SINCOCK, 377 US 695; LUCAS v COLORADO GENERAL ASSEMBLY, 377 US 713.

The federal courts have consistently followed REYNOLDS in granting state legislatures adequate time to reapportion.

It is obvious that the action of the Florida Legislature and the District Court's decisions in SWANN v ADAMS had the effect of perpetuating the invalid apportionment in that state from 1962 until 1969, a period of seven years.

No such factors appear in the present case. From the filing of Appellant Drum's Complaint on September 10, 1965, until the order of the court below on February 18, 1966, was a period of only five months and eight days. Under the order of February 18, 1966, only one election can be held under the interim plan and a period of approximately sixteen and one-half months will have elapsed before the General Assembly of North Carolina is required to enact a constitutional congressional redistricting plan.

There is no doubt that the General Assembly of North Carolina, which is now constitutionally reapportioned, will enact a valid congressional apportionment plan during the regular session of 1967, or the court below will decree a valid plan of its own motion.

CONCLUSION

For the reasons stated, Appellees respectfully urge this

Court that the court below did not abuse its equitable discretion and that its decision was based upon sound, equitable principles which have been recognized by this Court and, therefore, the opinion and order of February 18, 1966, should be affirmed.

Respectfully submitted,

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Appendix 1

STATISTICAL ANALYSIS OF NORTH CAROLINA CONGRESSIONAL DISTRICTS

Congressmen: 11
Districts: 11
Population range:

	District	*Population*	*Deviation from Average*
Largest	7	448,933	+8.39%
Smallest	3	377,293	−8.91%
Average		414,196	3.46%

Ratio of largest to smallest 1.19 to 1

NORTH CAROLINA CONGRESSIONAL DISTRICTS

District	*Population*	*Deviation*
1	384,300	−7.22%
2	419,370	+1.25
3	377,293	−8.91
4	416,477	+0.55
5	439,672	+6.15
6	411,687	−0.61
7	448,933	+8.39
8	409,759	−1.07
9	419,416	+1.26
10	409,174	−1.20
11	420,074	+1.42
Total	4,556,155	
Average	414,196	3.46%
Ratio	1.19:1	

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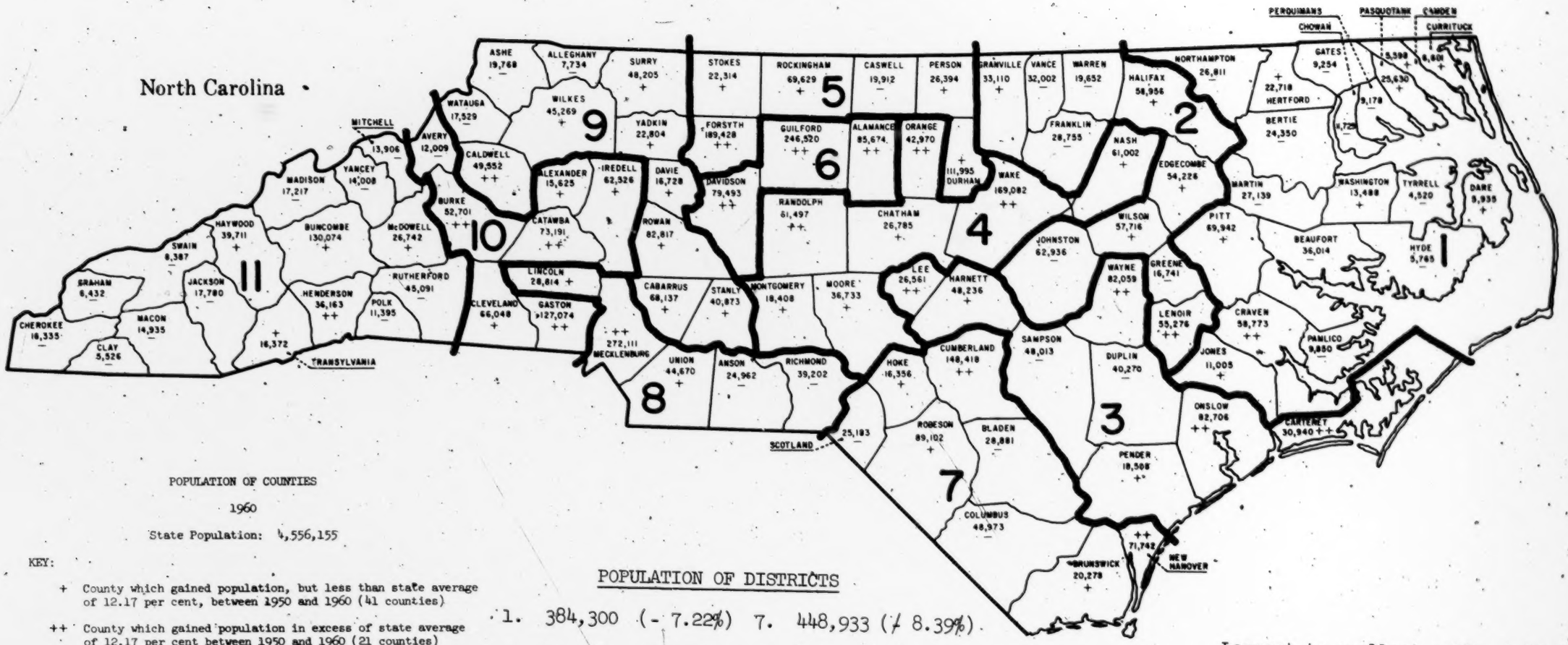
Appendix 2

CONGRESSIONAL DISTRICTS 1966 -



POPULATION OF COUNTIES

1960

State Population: 4,556,155

KEY:

\+ County which gained population, but less than state average of 12.17 per cent, between 1950 and 1960 (41 counties)

++ County which gained population in excess of state average of 12.17 per cent between 1950 and 1960 (21 counties)

\- County which lost population between 1950 and 1960 (38 counties)

POPULATION OF DISTRICTS

1.	384,300	(- 7.22%)	7.	448,933	(+ 8.39%)
2.	419,370	(+ 1.25%)	8.	409,759	(- 1.07%)
3.	377,293	(- 8.91%)	9.	419,416	(+ 1.26%)
4.	416,477	(+ 0.55%)	10.	409,174	(- 1.20%)
5.	439,672	(+ 6.15%)	11.	420,074	(+ 1.42%)
6.	411,687	(-0.61%)		4,556,155	

Largest to smallest ratio 1.19 to 1

Average deviation 3.46%

Average population per district 414,196

Session Laws 1966 (Ex. Sess.), C. 7